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No. 98-916

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

ALLISON DEAS,
Petitioner,
v.

RIVER WEST, L.P.; ALTERNATIVE ADDICTION TREATMENT CONCEPTS, INC.; and STROTHER P. LINDSEY-DIXON,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

INTRODUCTION

Since the submission of the petition in the pending case, this Court has granted writs of certiorari in three other cases in which the questions presented, like the one here, involve the interpretation of the protection accorded persons who are regarded by their employers as disabled under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101-12213 (1998).[1] Given the complementary

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[1] *See Murphy v. United Parcel Service, Inc.*, No. 97-1992, 1999 WL 5329 (U.S. Jan. 8, 1999); *Sutton v. United Air Lines, Inc.*, No. 97-1943, 1999 WL 5326 (U.S. Jan. 8, 1999); *Albertson's, Inc. v. Kirkingburg*, No. 98-591, 1999 WL 5332 (U.S. Jan. 8, 1999).

yet unique issues raised in this case about the proper analysis of claims brought by persons who were erroneously regarded as having an impairment that substantially limits a major life activity, the Petitioner requests that the Court grant review of this case and consolidate it with the other three cases under review or, in the alternative, hold this case pending the disposition of the other three cases.[2]

This case warrants review because the Fifth Circuit, like several other circuit and district courts, substituted its assessment of an employee's impairment for that of the employer,[3] in derogation of the ADA. In enacting the ADA, Congress sought to protect employees who may lack an impairment that substantially limits a major life activity but are denied an employment opportunity because their employers regarded them as having such an impairment. *School Board of Nassau County v. Arline*, 480 U.S. 273, 279 (1987). The Respondent, River West, discharged Ms. Deas because it believed she suffered from seizures and that those seizures impaired her ability to

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[2] The Respondents' opposition to this petition, in substantial part, rests upon the claim that the lower court decisions are factually unique and, therefore, inappropriate for review. *See* Brief of Respondent, River West, L.P. in Opp. to Pet. for Writ of Cert. at 1, 2; Brief of Alternative Addiction Treatment Concepts, Inc. and Strother P. Lindsey-Dixon in Opp. to Pet. for Writ of Cert. at 1. While this case, like most before this Court, is set in a particular factual context, the question presented raises a singular legal issue: Whether the Fifth Circuit erred by substituting its judgment for that of the employer in determining whether Ms. Deas was regarded as having an impairment that substantially limited a major life activity. If anything, the facts of this case add flesh to the bones of this legal issue, enhancing, rather than diminishing, the suitability of this case for review.

[3] *See e.g., Wooten v. Farmland Foods*, 58 F.3d 382, 386 (8th Cir. 1995); *Welsh v. City of Tulsa*, 977 F.2d 1415, 1419 (10th Cir. 1992); *Joyce v. Suffolk County*, 911 F. Supp. 92, 96-98 (E.D.N.Y. 1996); *Castorena v. Runyon*, No. 94-1456-PFK, 1994 WL 240762, at *4 (D. Kan. May 23, 1994) (App. pp. 17a-32a.)

remain alert and conscious throughout her work. (*See* Lindsey-Dixon Dep., App. pp. 3a-13a.) As such, River West believed that awareness constituted a major life activity. (*See* Lindsey-Dixon Dep., App. pp. 2a-4a.) Since Ms. Deas was treated as though her seizures substantially limited a major life activity, she qualified for protection under the ADA. The Fifth Circuit, however, held that Ms. Deas was not covered by the ADA because, notwithstanding the employer's perception, the court found that the ability to remain alert and conscious did not qualify as a major life activity *per se*. *Deas v. River West, L.P.*, 152 F.3d 471, 479 (5th Cir. 1998). While Ms. Deas's employer harbored a perception on the basis of which it terminated her employment, the Fifth Circuit second-guessed the employer several years after the fact by holding that the perception could not serve as a basis for protection under the ADA.

Since Congress intended to protect employees from being denied employment because of stereotypes and unfounded perceptions, the employer's conduct and beliefs, not a court's subsequent assessment of them, should be dispositive of whether protection under the ADA is available. The approach taken by the Fifth Circuit, and by the other courts that subscribe to it, impermissibly withholds protection simply because a court finds, after the fact, that the stereotypes on which the employer relied to deny an employment opportunity were not factually sufficient to qualify as an impairment of a major life activity. Congress intended otherwise and this Court's jurisprudence dictates a different result.

ARGUMENT

The record is clear that River West regarded Ms. Deas as having an impairment which substantially limited a major life activity. As such, Ms. Deas should have been accorded protection under the ADA. Instead, the Fifth Circuit held that the grounds on which Ms. Deas was discharged were not cognizable under the ADA. Although Ms. Deas's employer viewed her as disabled and, on the basis of that perception, it terminated her employment, the Fifth Circuit rejected her claim because it found the major life activity on which the employer relied did not qualify for protection. While River West discharged Ms. Deas because it believed her seizures substantially limited a major life activity, the Fifth Circuit disagreed with that belief and, accordingly, denied her protection. In enacting the ADA, however, Congress intended to protect employees from all stereotypes about disabilities, regardless of whether they conform to a legal interpretation of the disability laws. The stereotype on which River West relied to discharge Ms. Deas is no less pernicious simply because, in a court's subsequent judgment, the grounds for the stereotype failed to qualify as a disability. The discharge is nonetheless covered by the ADA.

Ms. Deas suffers from a seizure disorder which periodically causes her to become momentarily less alert than people without the disorder. (*See* Deas Dep., App. pp. 14a-16a.) Based upon experience with Ms. Deas from one day of work, River West discharged her. (*See* Lindsey-Dixon Dep., App. pp. 1a-2a, 4a-5a, 9a-10a.) It concluded that her seizures, which caused her to lose consciousness for "several seconds" at a time, precluded her from working effectively. (*See* Lindsey-Dixon Dep., App. pp. 3a-13a.) During deposition, River West acknowledged that it had discharged Ms. Deas because of her seizures. *Deas,* 152 F.3d at 475-76. River West also expressed the view that the seizures substantially affected Ms. Deas's awareness and that it regarded awareness as a major life

activity.[4] (See Lindsey-Dixon Dep., App. pp. 1a-13a.) Because Ms. Deas's seizures do not in fact substantially limit a major life activity, she did not have an impairment that in itself would have qualified for protection under the ADA. But since River West discharged Ms. Deas because it regarded her as having an impairment that substantially limited a major life activity, she nonetheless claimed protection under the ADA. Accordingly, Ms. Deas alleged in her complaint that her employer had regarded her as having an impairment that substantially limited the major life activities of seeing, hearing, speaking and working. *Deas,* 152 F.3d at 479. On appeal, the Fifth Circuit identified as a primary issue before it whether awareness qualified as a major life activity.[5] *Id.* Since River West had regarded awareness as a major life activity, the Fifth Circuit improperly reassessed and, ultimately substituted its judgment for, the views of the employer.

The Fifth Circuit began its analysis of this issue by correctly stating that

> [u]nder the 'regarded as' prong, the disability status of the plaintiff turns not on the plaintiff's physical condition, but rather on how the plaintiff was perceived and treated by those individuals alleged to have taken discriminatory action.

Id. at 476. The court departed from this course, however, when it rejected awareness as a major life activity. *Id.* at 471. Rather than accepting the employer's perception that awareness was a major life activity, the court engaged in its own assessment. Citing no legal or medical authority,

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[4] There is also no dispute that River West regarded Ms. Deas's seizures as an impairment. *Deas,* 152 F.3d at 476.

[5] The Court of Appeals also considered whether there was sufficient evidence that River West regarded Ms. Deas as substantially limited in other major life activities. *Id.* at 480-82. The Court did not have occasion to substitute its judgment for that of the employer in assessing these other major life activities and thus the Petitioner does not seek review of them.

the Fifth Circuit simply concluded that since "awareness" was "not susceptible to any precise definition[,]" it would not recognize awareness as a major life activity *per se*. *Id.* In doing so, the court pursued the wrong inquiry The only question properly raised was whether the employer in this case regarded "awareness" as a major life activity. Since River West clearly answered that question in the affirmative, no further inquiry was warranted on this record. The Fifth Circuit was not called upon to determine whether "awareness" is, in all circumstances, a major life activity, only whether River West regarded it as such in this case.

By its very nature, the protection accorded by the ADA to employees who are regarded as having an impairment of a major life activity sweeps within its ambit persons who have been subject to stereotypes that may bear little or no relation to reality. *See Arline*, 480 U.S. at 279. It would defeat the purpose for which Congress enacted this protection to limit its scope to impairments which, viewed rationally, would substantially limit a major life activity. Such constraints may be warranted in construing the protections accorded persons who claim they have a real impairment that actually limited a major life activity. *See* 29 C.F.R. app. § 1630.2(j) (1998); Equal Employment Opportunity Commission, *Equal Employment Opportunity Commission Compliance Manual 2*, EEOC Order 915.002, § 902 (1995) at 902-18 to 902-20. In this case and others like it, however, where the disability is created by the employer's perceptions, nothing more than the presence of the stereotypes and personnel action based on them should suffice to warrant protection by the ADA.

Congress could not have been more clear in expressing its intention to protect employees from stereotypes about disabilities that their employers may harbor, regardless of whether the employees in fact have an impairment that substantially limits a major life activity. The House

Committee on the Judiciary explained that the protection accorded to employees because they are regarded as having an impairment is necessary because "society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment." H.R. Rep. No. 101-485 (III), at 30 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 453 (quoting *Arline*, 480 U.S. at 284). In Report language that expressly repudiates the approach undertaken by the Fifth Circuit below, Congress expressed its intention to provide protection,

> whether or not the employer's perception was shared by others in the field and *whether or not the person's physical or mental condition would be considered a disability under the first or second part* of the definition.

H.R. Rep. No. 101-485 (III), at 30 (1990), *reprinted in* 1990 U.S.C.C.A.N. at 453 (emphasis added). Accordingly, Congress intended to extend protection to persons who were denied employment opportunities because of their employers' perceptions, regardless of whether those perceptions would have qualified under the other definitions of disability under the Act.[6] As someone whose employer regarded her as having an impairment that substantially limited a major life activity, Ms. Deas was entitled to protection under the ADA.

The Senate echoed this intention espoused by the House, explaining that the need for this protection of persons regarded as having an impairment is especially

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[6] The ADA defines disability as the satisfaction of one or more of the following criteria:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2) (1998).

heightened for persons, like Ms. Deas, who have seizure disorders.

> [T]he third prong of the definition is designed to protect individuals who have impairments that do not in fact substantially limit their functioning. . . . This . . . prong is *particularly important for individuals with stigmatic conditions* that are viewed as physical impairments but do not in fact result in a substantial limitation of a major life activity. . . . [An] important goal of the third prong of the definition is to ensure that persons with *medical conditions that are under control*, and that therefore do not currently limit major life activities, are not discriminated against on the basis of their medical conditions. For example, *individuals with . . . epilepsy are often denied jobs for which they are qualified. Such denials are the result of negative attitudes and misinformation.*

S. Rep. No. 101-116, at 23-24 (1989), H. Rep. No. 101-485(II), at 53 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 335 (emphasis added). The circumstances in which Ms. Deas was discharged, therefore, present the classic case which the Senate contemplated in passing the ADA.

This legislative history confirms that Congress intended to afford protection under the ADA against employer stereotypes, regardless of whether those stereotypes would have served as a basis to qualify under either of the other two definitions of disability. Accordingly, the stereotypes harbored by River West here should have sufficed below to warrant protection for Ms. Deas.

CONCLUSION

For the reasons set forth above and in the petition, Allison Deas respectfully requests that the Court grant review and either consolidate this case with the three other similar cases that the Court has recently taken or hold this case pending disposition of those other cases.

Respectfully submitted,

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